JD–47–21
Alvarado, TX

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

LASALLE SOUTHWEST CORRECTIONS

and **Case 16-CA-264520**

FEDERAL CONTRACT GUARDS OF AMERICA

Maxie Gallardo Miller, Esq. and Robin Harvey, Esq.,
for the General Counsel.
Kim Nguyen, Esq., of New York, New York,
for the Charging Party.
Bindu Gross, Esq. (Ogletree, Deakins, Nash, Smoak & Stewart),
of Dallas, Texas, for the Respondent.

DECISION

Statement of the Case

KELTNER W. LOCKE, Administrative Law Judge. What an employer actually does, not its description of what it does, establishes its workers' terms and conditions of employment. Until its employees chose union representation, the Respondent had allowed them to eat lunch without clocking out. Its unilateral announcement that henceforth they would have to follow a previously-unenforced rule, and clock out for lunch, violated Section 8(a)(5) of the Act.

PROCEDURAL HISTORY

This case began August 20, 2020, when the Federal Contract Guards of America (referred to below as the Union or the Charging Party) filed with the Board an unfair labor practice charge against the Respondent, LaSalle Southwest Corrections. Staff at the Board's office in Fort Worth, Texas, docketed the charge as Case 16-CA-260420.

After an investigation, the acting regional director for the Board's Region 16, on behalf of the Board's General Counsel, issued a complaint and notice of hearing on December 23, 2020. The Respondent filed a timely answer.

On March 15, 2021, a hearing opened before me by videoconference. On March 16,

2021, the General Counsel[1] rested. In light of the testimony presented by the General Counsel, the Respondent wished to present witnesses who were not then available, and requested a recess. I proposed recessing the hearing until March 29, 2021, and the Respondent did not object to that date.

The hearing recessed until March 29, 2021, when it resumed to receive the Respondent's evidence. The hearing closed on March 30, 2021. I set a deadline of May 4, 2021, at close of business in the Eastern time zone, for filing post-hearing briefs.

The Motion to Strike Respondent's Brief

On May 6, 2021, the General Counsel filed a motion to strike the Respondent's post-hearing brief. That motion stated, in part:

> To give meaningful effect to Judge Locke's unambiguous statements, briefs must have been filed by 4:00 PM Central Time, May 4, 2021, as the traditional close of business time is 5:00 PM Eastern.
>
> Both Counsel for the Acting General Counsel and the Charging Party timely filed briefs at 4:41 PM ET and 4:51 PM ET, respectively, on May 4, 2021. Respondent did not file and serve its post-hearing brief until 5:27 PM CT, or 6:27 PM ET, almost an hour and a half after the deadline. To the Acting General Counsel's knowledge, Respondent did not make a request for a further extension of time to serve and file the brief. Further, Respondent made no motion with the filing of the brief to permit the late acceptance of the same.

The Respondent's counsel admits that the brief was filed 87 minutes late and. on May 13, 2021, submitted a motion to permit late filing. The motion included, as an exhibit, an affidavit from Respondent's counsel, which stated, in part:

> In my capacity as associate attorney, I made all of the necessary preparations necessary to file Respondent's Post-Hearing Brief in this matter prior to the deadline. I had completed the Brief, and was prepared to finalize, format, and file the same. At the last minute (approximately 4:45 PM EST), however, I discovered unexpected errors when finalizing the Table of Authorities and Table of Contents section. Specifically, the Tables did not distinguish between authorities (cases, statutes, etc.), and were improperly cited. The errors caused a delay in finalizing the Brief.

Section 102.111(c) of the Board's Rules and Regulations specifies the circumstances under which a brief may be filed after the deadline. It states, in part:

[1] When the hearing opened, an acting General Counsel was serving as the Board's General Counsel and accordingly, the attorney seeking to prove a violation of the Act bore the title "Counsel for the Acting General Counsel." On July 23, 2021, the United States Senate confirmed the appointment of the Hon. Jennifer Abruzzo to the position of General Counsel. For brevity, the attorney prosecuting this case will be referred to as the General Counsel or the "government."

> (c) In unfair labor practice proceedings, motions, exceptions, answers to complaint or a backpay specification, and briefs may be filed within a reasonable time after the time prescribed by these rules *only upon good cause shown based on excusable neglect and when no undue prejudice would result.* A party seeking to file such motions, exceptions, answers, or briefs beyond the time prescribed by these rules shall file, along with the document, a motion that states the grounds relied on for requesting permission to file untimely. The specific facts relied on to support the motion shall be set forth in affidavit form and sworn to by individuals with personal knowledge of the facts. (Italics added.)

Therefore, in considering whether there is good cause to grant the Respondent's motion I will consider whether there has been "excusable neglect" and whether undue prejudice would result. In applying the "excusable neglect" standard, the Board draws guidance from the Supreme Court's decision in *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, 507 U.S. 380 (1993). Although that case involved the interpretation of a rule in bankruptcy court, the same general principles are applicable in Board proceedings.

In everyday usage, the word "neglect" connotes an act of negligence. It implies that the filer was somehow at fault for the tardiness. However, the Supreme Court held that "excusable neglect" also could result when intervening circumstances, beyond a party's control, caused the delay. *Pioneer Investment Services Co.*, 507 U.S. at 388. Therefore, it is not necessary for the Respondent to show that any blameworthy act caused the errors which required additional time to correct.

The *Pioneer Investment Services Co.* considered the following four factors in determining whether "excusable neglect" caused the filing delay:

- The danger of prejudice to the opposing party,
- The length of the delay and its potential impact on judicial proceedings,
- The reason for the delay, including whether it was within the reasonable control of the movant, and
- Whether the movant acted in good faith

With respect to the first factor, the 87-minute delay in filing the brief caused no prejudice to either the General Counsel or the Charging Party. During that time period, between the close-of-business deadline and the actual filing, the Respondent's counsel did not read any brief of an opposing party. Rather, he spent that time correcting errors in his brief's table of authorities and table of contents.

Likewise, the short length of the delay - 87 minutes - weighs in favor of finding excusable neglect.

As to the third factor, the delay was within the control of the movant. However, it is understandable that counsel would not wish to file a brief knowing that there were errors in it.

The movant clearly acted in good faith. There was nothing to gain by delaying filing

the brief for this short period.

Thus, at least three four factors weigh in favor of the movant. The other factor, whether the delay was within the control of the movant, does not clearly weigh against the Respondent.

Moreover, in our adversarial system, truth and insight emerge from the collision of conflicting evidence and arguments. Rejecting the Respondent's brief could reduce the efficiency and accuracy of this process.

In sum, I conclude that the Respondent has established that the 87-minute delay results from excusable neglect and that no undue prejudice would result from granting the Respondent's motion. Further, I conclude there is good cause to receive the Respondent's post-hearing brief and do so.

Respondent's Challenge to Authority of the Acting General Counsel

The General Counsel alternatively moves to strike "the argument in footnote 1 of Respondent's Brief quoted above as the argument is untimely." In that footnote, the Respondent argues that "President Biden's removal of General Counsel Peter Robb without proper cause was unlawful under the National Labor Relations Act" and therefore "anyone acting on behalf of the General Counsel with respect to prosecution of this action is acting *ultra vires*, or without lawful authority to do so." The Respondent seeks to have the case dismissed or, alternatively, that the proceeding be stayed until the previous General Counsel is reinstated "or until the taint of his unlawful removal is eliminated."

The General Counsel, noting that President Biden's action took place well before the hearing in this matter, argues that the Respondent should have raised this issue earlier:

> Respondent failed to make a motion to amend its answer to include [this argument] as an affirmative defense and there is nothing in the administrative record regarding the issue. Any amendment to Respondent's answer could and should have been made prior to the close of the unfair labor practice hearing. [Citations omitted.]

However, the Respondent argues, in effect, that the issue goes to jurisdiction and may be raised at any time. The Respondent's response to the General Counsel's motion states:

> [L]ike challenges to subject matter jurisdiction, challenges attacking the ability, lawful authority, and/or jurisdiction of the General Counsel should not be subject to waiver. If, indeed, the now-Acting General Counsel had no authority to prosecute this case, then allowing the Counsel for the Acting General Counsel to continue to prosecute the case would result in a fundamental miscarriage of justice, not to mention a waste of precious government resources. [Footnote omitted.]

It is not necessary to decide whether the Respondent's argument is "jurisdictional" in

the sense that it may be raised at any time. Even assuming that the Respondent is correct that the argument has no pull date, it still must base its argument on facts established by evidence placed in the record before the close of the hearing.

The following hypothetical illustrates that the legal issue cannot be considered or resolved by itself, in a fact-free vacuum: Assume that the Respondent objects that "counsel for the General Counsel is not a lawyer. Her degree is in veterinary medicine."

Counsel for the General Counsel may wish to reply either that (1) she is, in fact, a licensed attorney and/or (2) her authority to prosecute does not depend on whether she is a lawyer. Her first argument concerns the facts, not the law.

She need not accept the Respondent's version of the facts unchallenged but must have the opportunity to test the Respondent's evidence and to present conflicting evidence. Thus, even with respect to a "jurisdictional" objection which does not "expire," due process requires that the Respondent establish the foundational facts by presenting evidence at a time when the other side can try to call into question its probative value and seek to refute it.

Returning to the Respondent's actual argument, rather than the hypothetical, it is clear that the Respondent must base its claim that the previous General Counsel was not lawfully discharge and therefore the acting General Counsel lacks authority - on some actual evidence in the record. In other words, the Respondent must rebut the presumption of administrative regularity - which in this instance amounts to a presumption that the Acting General Counsel possesses the authority to prosecute - by presenting evidence of irregularity.

However, the present record includes no evidence concerning the removal of the previous General Counsel or the appointment of the present Acting General Counsel. The Respondent did not offer any such evidence at the hearing and has not sought to supplement the record with such evidence now. Likewise, the Respondent has not asked that I take judicial or administrative notice of any facts.[2]

Thus, the Respondent has not based its objection on any evidence in the record. Therefore, I reject it.[3]

Admitted Allegations

In its answer, the Respondent has admitted allegations raised in the complaint. Based

[2] It is far from clear that judicial or administrative notice would be appropriate under Section 201 of the Federal Rules of Evidence. The appropriateness can only be determined by reference to the specific request, and the Respondent has not made a request.

[3] As noted in footnote 1 of this decision, on July 21, 2021, the United States Senate confirmed the nomination of the Hon. Jennifer Abruzzo as General Counsel. In view of my conclusion that the Respondent has not established a factual record to support its argument, it is not necessary to determine whether the confirmation of a new General Counsel moots that argument.

Additionally, it is not necessary to strike from the record footnote 1 in the Respondent's brief because a brief to the administrative law judge is not part of the record as defined in Section 102.45 of the Board's Rules.

on those admissions, and in some instances on certificates of service which are not in dispute, I make the following findings.

The Charging Party filed the unfair labor practice charge in this case on August 20, 2020. On the same date, a copy was served on the Respondent by United States mail.

The Respondent is a corporation with a place of business in Alvarado, Texas, where it operates the Prairieland Detention Center facility. At all material times, it has been and is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.[4]

Union's Status as Labor Organization

Complaint subparagraph 3(b) alleges that the Charging Party is a labor organization within the meaning of Section 2(5) of the Act and complaint subparagraph 3(a) alleges facts to support that legal conclusion. The Respondent's answer to each allegation begins by claiming that it does not have enough information to form a belief as to the truth of the allegation, but then the answer goes on to express such a belief.

Specifically, the answer states that the Respondent "is informed and believes that the Charging Party is a labor organization within the meaning of Section 2(5) of the Act." It turns out that the Respondent had some good reasons for that belief. Certainly, the Board-conducted election, resulting in a January 27, 2020 certification of representative, should have given the Respondent a clue.

Moreover, Union Vice President and Legal Counsel Kim Nguyen gave uncontradicted testimony, which I credit, that the Respondent began contract negotiations with the Union in April 2020, resulting in a collective-bargaining agreement effective from December 1, 2020 to December 1, 2023. So, at the time Respondent filed its January 6, 2021 answer to the complaint - professing insufficient information to know for sure whether the Charging Party was a labor union - it already had negotiated a collective-bargaining agreement with that very same organization.

Based on the Board's certification, the Respondent's conduct in entering into a collective-bargaining agreement, and the record as a whole, I find that the Charging Party is a labor organization within the meaning of Section 2(5) of the Act.

Union's Status as Exclusive Bargaining Representative

The government seeks to prove that the Respondent breached its duty to bargain in good faith with the Union by making a change in working conditions without first giving the Union an opportunity to bargain about it. However, such a unilateral change is unlawful only if an

[4] The Respondent's answer does not admit that it operates this detention center on behalf of United States Immigration and Customs Enforcement, a division of the United States government. However, based on the record, I find that to be true. Additionally, based on the record as a whole, I conclude that it is appropriate for the Board to assert jurisdiction in this case.

employer has a duty to bargain with a union, and that duty arises only if that union is the exclusive bargaining representative of an appropriate unit of the employer's employees.

Therefore, to prove that an employer violated the Act, the General Counsel must do more than show that an employer changed working conditions without notifying a union. It must also allege and prove that the union possesses the unique status of being the exclusive bargaining representative of certain the employer's workers in an appropriate bargaining unit.

A union attains the status of exclusive bargaining representative by being "designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes." The quoted language appears in Section 9(a) of the Act, so a union's status as exclusive bargaining representative sometimes is referred to as "9(a) status." See 29 U.S.C. § 159(a).

The General Counsel also must show that the bargaining unit represented by the Union is an appropriate unit within the meaning of Section 9(b). That section includes a number of limitations on which employees appropriately may be included in the bargaining unit.[5]

The various subparagraphs of complaint paragraph 5 relate to these requirements. Subparagraph 5(a) describes a bargaining unit and alleges that it is appropriate. Subparagraph 5(b) alleges that the Board certified the Charging Party to be the exclusive bargaining representative of the employees in that unit. Subparagraph 5(c) alleges that at all material times, the Charging Party has been the exclusive bargaining representative.

The Respondent's answer does not admit these allegations. Instead, it avers that they "state legal conclusions for which no answer is required." That is not entirely true. Complaint subparagraph 5(b) alleges a fact, namely, that the Board certified the Union on January 27, 2021.

Because the Respondent has not admitted any of the allegations in complaint paragraph 5 the government must prove them. However, the General Counsel did not present much evidence on these issues. In discussing whether the government has carried its burden of proof, it is appropriate to begin with the allegation of fact, because if the record fails to establish the alleged fact, the alleged conclusion of law fails as well.

Complaint subparagraph 5(b) alleges that on "January 27, 2020, the Board certified the Union as the exclusive collective-bargaining representative of the Unit." (The term "Unit" refers to the collective-bargaining unit described in subparagraph 5(a), which will be discussed shortly.) Typically, the government would prove that the Board certified a union as exclusive bargaining representative by introducing into evidence a copy of the certification of representative. It didn't do so here.

[5] For example, it prohibits the Board from deciding "that any unit is appropriate for [collective–bargaining] purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises. . ." See 29 U.S.C. § 159(b).

The Charging Party's vice president and legal counsel, Kim Nguyen, testified that the Board conducted a representation election in a unit consisting of fulltime and parttime detention officers, that the Union won this election, and that "we were certified as the bargaining representative around January of 2020." No testimony or other evidence contradicts Nguyen's testimony.

The General Counsel must prove allegations by a preponderance of the evidence. That standard only requires that the evidence establish that the allegation is more likely true than not. Nguyen's uncontradicted testimony satisfies this standard, so I find that the Board certified the Charging Party as exclusive bargaining representative sometime in January 2020.

But exclusive bargaining representative of what? Does the bargaining unit described in the certification of representative match the "Unit" described in subparagraph 5(a) of the complaint? That subparagraph describes the "Unit" as follows:

> Included: All full-time and regular part-time armed and unarmed detention officers who perform guard duties as defined in Section 9(b)(3) of the Act who are employed by the Employer at the Prairieland Detention Center located at 1209 Sunflower Lane, Alvarado, Texas.
>
> Excluded: All other employees, including administrative and clerical employees, professionals, managers and) supervisors as defined by the Act.

Nguyen testified that the unit consisted of full-time and part-time detention officers. Although that brief description does not address what employees were excluded from the bargaining unit, it generally matches the unit description in complaint subparagraph 5(a).

Significantly, no other testimony or evidence contradicts Nguyen's testimony. No party asserts that there are employees other than detention officers in the bargaining unit. I find that the General Counsel has proven, by a preponderance of the evidence, that the bargaining unit which the Board certified and the bargaining unit described in complaint subparagraph 5(a) are identical.

Complaint subparagraph 5(a) also includes another allegation, that the described bargaining unit is appropriate within the meaning of Section 5(b) of the Act. Because the bargaining unit described in the complaint is identical with the unit certified by the Board, it clearly is appropriate and I so find. The Board would not certify an inappropriate unit.

In sum, the General Counsel has proven all of the allegations raised by complaint paragraph 5 and its subparagraphs. I find that at all times since January 27, 2020, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the full-time and part-time detention officers employed by the Respondent at the Prairieland Detention Center in Alvarado, Texas.

Supervisory Status

Paragraph 4 of the original complaint alleges that Lieutenant Rodriguez, Lieutenant Ryan and Chief Clark were supervisors within the meaning of Section 2(11) of the Act and Respondent's agents within the meaning of Section 2(13) of the Act. At hearing, the General Counsel amended the complaint to allege that Captain Turner was also a supervisor and agent of the Respondent. The General Counsel did not know the first names of these individuals.

The Respondent's answer states that it "is without knowledge or information sufficient to form a belief as to the truth of the averments of this Paragraph including to what time period '[a]t all material times' refers, and therefore denies the allegations in Paragraph 4."

Section 2(11) of the Act defines "supervisor" to mean "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." See 29 U.S.C. § 152(11).

Thus, to warrant a conclusion that a particular person meets the statutory definition of supervisor, the evidence must establish three elements: (1) That the individual had authority to perform one of the functions listed in the statute; (2) that the individual exercised this authority in the interest of the Employer, and (3) that the exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment.

Three of the individuals alleged to be supervisors - Rodriguez, Ryan and Clark - did not testify. The fourth, Turner, testified, but his testimony sheds little light on whether he possessed sufficient authority to satisfy the requirements of Section 2(11). The testimony of other witnesses also falls short of establishing that any of the alleged supervisors met the statutory definition.

However, the General Counsel did introduce into evidence job descriptions, which the Respondent had produced pursuant to subpoena, for the positions of lieutenant, captain and major. A person with the rank of major also has the job title of "chief."

The job description for lieutenant begins with this summary:

> Perform supervisory functions in the facility as it pertains to the security and administrative control of the facility. Work involves scheduling, training, and supervising staff, as well as maintaining order and discipline among detainees. Work under general supervision with *moderate latitude for the use of initiative and independent judgment*. [Italics added.]

Section 2(11) of the Act defines the term "supervisor" by reference to the authority the person possesses. To meet the statutory definition, the person must possess the authority to do one or more of the 11 actions listed in that section. The general statement that an individual

performs "supervisory functions" does not establish what authority the person has been given to carry out any of the duties specified in the statute.

Section 2(11) further requires that the exercise of this authority requires the use of independent judgment rather than being merely of a routine or clerical nature. The job description indicates that a lieutenant has "moderate latitude for the use of initiative and independent judgment." The words "moderate latitude" suggest a limitation on the exercise of independent judgment but the job description does not indicate the extent of the limitation.

After the summary quoted above, the job description for lieutenant continues with the following list of "essential duties and responsibilities":

- Organize and conduct inspections and searches of detainees and their living and work areas.
- Prepare records and reports as assigned.
- Maintain log and verify detainee counts.
- Foster a team effort among correctional officers providing support, motivation, training, and assistance to them as required.
- Report and investigate all unusual occurrences.
- Direct the work of employees to ensure effectiveness.
- Supervise daily routine of the security section.
- Enforce post orders and ensure that correctional officers are familiar with shift assignments.
- Handle disciplinary reports and prepare reports of disturbances and shift activities.
- Function as shift supervisor: supervise, instruct, train, and ensure the safety of assigned employees and detainees, schedule employees and detainees work and off-duty time; and assist in formulating security and work procedures.
- Supervise and direct searches for contraband and provide security; court, feed, and supervise detainees in housing, work and other areas accessed by stairs, steps, and ladders; and perform security of various assigned areas involving long periods of sitting and standing, and climbing stairs, steps, and ladders to reach the assigned areas.
- Supervise and provide custody and security of detainees including observing actions of detainees squatting and bending to perform "pat" searches of detainees; restraining and securing sometimes assaultive detainees; and transferring and transporting detainees by walking or riding in various vehicles such as trailers, vans, buses, etc.
- Supervise and provide security of detainees performing technical skills such as construction, maintenance, laundry, food service, and in varied industrial and agricultural operations which involve climbing stairs, steps, and ladders, and climbing around the inside and outside of buildings; work outdoors and indoors without air conditioning; work around motorized or moving equipment and machinery; subject to all types of weather.
- Respond to emergencies including climbing stairs, steps and ladders while searching for escaped detainees; hearing calls for and calling for help; giving first aid at the emergency site; carrying an injured or unconscious detainee or employee various distances to safety up or down stairs, steps, and ladders; use force to include the use

of chemical agents to control detainees.

- Read, review, and properly apply information found in detainee records which is related to said individual's health and safety and to the security of the facility; provide appropriate information to other personnel; comply with all policies, procedures, rules, and regulations; enforce detainee disciplinary rules; and supervise the preparation and maintenance of records, forms and reports.
- Perform a variety of marginal duties not listed, to be determined and assigned as needed.

The job description does not address whether a lieutenant has any role in the hire, transfer, suspension, layoff, recall, reward, promotion, or discharge of employees so I must assume he does not. Instead, I find that a lieutenant's duties pertain to the assignment and direction of employees.[6]

The job description repeatedly uses the words "supervises" and "directs" and also indicates that a lieutenant has some involvement in disciplinary matters. However, it does not answer the question of how much independent judgment the lieutenant uses in carrying out these functions. The phrase "moderate latitude for the use of initiative and independent judgment" remains cryptic and keeps us guessing.

The job description suggests that a lieutenant directs employees in the performance of certain tasks. For example, lieutenants "[o]rganize and conduct inspections and searches of detainees and their living and work areas." Presumably, a lieutenant does not search and inspect all by himself but directs a team.

The job description similarly states that a lieutenant "direct[s] the work of employees to ensure effectiveness." However, neither the job description nor other evidence establishes that the lieutenants are held accountable for the performance of those whom they direct. See *Barstow Community Hospital*, 352 NLRB No. 125 (2008). To carry the burden of proving that someone "responsibly directs" employees, the proponent of supervisory status must do more than show that such accountability exists "on paper." *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006). In this case, there is not even a paper showing of accountability.

The record also does not reveal the extent to which the lieutenants exercise independent judgment when they direct others. The Board has observed that it "may happen that an individual's assignment or responsible direction of another will be based on independent judgment within the dictionary definitions of those terms, but still not rise above the merely routine or clerical." *Oakwood Healthcare, Inc.*, 348 NLRB 686, 693 (2006).

In that same decision, the Board held that "a judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement." 348 NLRB at 693.

[6] Some of the listed job duties pertain to the supervision of *detainees*. However, I consider here only the duties related to assigning and directing *employees*.

Few, if any, work environments would be more subject to fixed rules than a prison or detention facility. Indeed, the job description specifically states that it is a lieutenant's duty to "comply with all policies, procedures, rules, and regulations; enforce detainee disciplinary rules; and supervise the preparation and maintenance of records, forms and reports."

Considering how greatly rules and policies dictate how detention officers must perform their work, I cannot simply assume that a lieutenant is exercising independent judgment when he directs them. Certainly, the Board also holds that the existence of company policies does not eliminate independent judgment from decision-making if the policies allow for discretionary choices." *Oakwood Healthcare, Inc.*, 348 NLRB at 693. However, the exercise of independent judgment cannot simply be assumed in the absence of evidence.

The present record does not establish the extent to which the Respondent's rules and policies allow the lieutenants to make discretionary choices. Therefore, I must conclude that the General Counsel has not carried the government's burden of proof.

Although I do not find that the lieutenants are supervisors within the meaning of Section 2(11) of the Act, I do conclude that they are Respondent's agents within the meaning of Section 2(13) of the Act. At the start of each shift, the detention officers assemble for a "turn-out," at which a lieutenant tells them about any instructions from management and provides information about any relevant recent events at the facility.

Considering that these briefings took place at the Respondent's facility, that employees attended them as part of their daily work duties, and that the lieutenant routinely would convey information and instructions from management, I conclude that employees reasonably would believe that the lieutenant conducting the meeting was speaking and acting for management. Therefore, I further conclude that the lieutenants are the Respondent's agents. *Albertson's, Inc.*, 344 NLRB 1172 (2005).

A similar analysis applies to the Respondent's captains. The job description does not indicate that a captain performs any of the functions listed in Section 2(11) other than directing employees. It does state that a captain "[r]eviews disciplinary matters concerning both staff and detainees" but does not establish that he possesses authority to impose discipline, to countermand discipline imposed by someone else, or effectively to recommend such action.

Neither the job description nor other evidence indicates the extent to which a captain exercises independent judgment or makes discretionary choices.[7] Therefore, I conclude that the General Counsel has not carried the government's burden of proof.

However, employees reasonably would believe that a captain was speaking and acting

[7] Security Chief Jessie Turner testified that when he was a captain he oversaw 4 different shifts. However, vague terms such as "oversee" and "oversaw" communicate nothing about the extent to which a captain exercises independent judgment. Such vague terms also provide no information about a captain's authority to perform the supervisory functions listed in Section 2(11) of the Act.

for management, particularly when he was speaking at a "turn-out" meeting. The obvious reason for attending such a start-of-shift briefing was to receive instructions from management. Therefore, I conclude that captains are Respondent's agents within the meaning of Section 2(13) of the Act.

According to the job description for major, a person holding this position "[d]irectly supervises the shift lieutenants and captain." The job description also indicates that a major has some authority to "evaluate staff performance" and to "[a]ssist in staff selection process."[8] However, the job description does not provide specific information regarding the extent or scope of such duties. Similarly, it does not reveal whether or not a major, performing these functions, possessed authority to make decisions or effective recommendations. Moreover. neither the job description nor other evidence establishes the extent to which a major exercises independent judgment while assigning, directing and evaluating employees. Although it seems plausible that someone holding the rank of major would, in fact, exercise independent judgment and be held accountable for the performance of subordinates, plausibility does not substitute for evidence.

In these circumstances I conclude that the General Counsel has not carried the government's burden of proof. However, although I do not find that a major is a statutory supervisor, the evidence appears clear that employees reasonably would believe that a major, imparting information about terms and conditions of employment, was speaking for management. Therefore, I conclude that a major is an agent of the Respondent within the meaning of Section 2(13) of the Act.

In sum, I do not find that Lieutenants Rodriguez and Ryan, Chief (Major) Clark, and Captain Turner are supervisors within the meaning of Section 2(11) of the Act. However, I do find that they are Respondent's agents within the meaning of Section 2(13) of the Act.

The Alleged Unfair Labor Practice

Complaint subparagraph 6(a) alleges that in about July 2020, the Respondent stopped its practice of paying employees for time spent on break. Complaint subparagraph 6(b) alleges that this change related to a mandatory subject of bargaining. Complaint subparagraph 6(c) alleges that the Respondent made this change without prior notice to the Union and without affording the Union an opportunity to bargain.

The Respondent denies all of these allegations. The Respondent also denies the conclusion, alleged in complaint paragraph 7, that this change violated Section 8(a)(5) and (1) of the Act. It further denies that the alleged unfair labor practice affected commerce within the meaning of Section 2(6) and (7) of the Act.

[8] The job description also indicates that a major performs a number of administrative duties such as helping the associate warden prepare a budget, monitoring expenditures, and reviewing reports and permanent records of detainees. These responsibilities do not relate directly to the indicia set forth in Section 2(11). However, because a member of management typically would perform such functions, employees reasonably would believe that when a major made statements about conditions of employment, he was speaking for management.

Facts

Respondent pays detention officers by the hour and they "punch" a "time clock." More precisely, employees record their starting and quitting times using a computerized device which identifies them by fingerprint. During the day, an employee may take two paid 15-minute rest breaks without having to clock out. In other words, the Respondent pays its employees for the time spent on these 15-minute breaks.

An employee also may take a 30-minute meal break. However, the parties dispute whether the Respondent had an established practice, before July 2020, of allowing employees to take these meal breaks without having to clock out.

The sole violation alleged in the complaint concerns whether the Respondent previously paid detention officers for this half hour meal break and then, in about July 2020, without notifying and bargaining with the Union, began requiring officers to clock out, thereby ceasing to compensate them for that time.[9]

To establish a violation, the General Counsel must prove that (1) before July 2020, there was an established practice that detention officers were not required to clock out before taking this 30-minute meal break; (2) that in about July 2020 the Respondent ended this practice and began requiring these employees to clock out before this break; and (3) that the Respondent did not first notify the Union and give it the opportunity to bargain concerning the change and its effects or that it made the change without first bargaining to impasse or agreement.[10]

Conditions Before July 2020

At all relevant times, the Respondent's employee handbook has stated that detention officers receive an *unpaid* 30-minute break. However, the General Counsel presented witnesses who testified that, before July 2020, detention officers took their meal breaks without clocking out.

For several reasons, I conclude that this testimony, which will be discussed further below, is reliable. For one thing, if it had not been accurate, the Respondent could have called witnesses with first-hand knowledge - detention officers or their immediate supervisors - to testify that the employees actually had a practice of clocking out for their meal breaks. However, the Respondent adduced no such testimony.

Instead, the Respondent called its director of human resources, Jody Tillman, whose

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[9] At hearing, the General Counsel made clear that the alleged unilateral change - stopping its practice of paying employees for time spent on break - referred only to the 30–minute lunch break. The government does not allege that the Respondent changed its practice of paying employees for the two 15–minute work breaks each day.

[10] Additionally, the change must (1) amount to a material, substantial and significant change (2) in a condition of employment (3) which is a mandatory subject of collective bargaining. Because these requirements concern conclusions of law, they will be discussed in the Analysis section of this decision. *Millard Processing Services*, 310 NLRB 421, 425 (1993); *Peerless Food Products*, 236 NLRB 161 (1978).

office was at another location and who visited the Prairieland facility only about once year. While testifying, she referred to time and attendance records which showed that some employees, on some occasions, had clocked out for periods which might be meal breaks. However, she had no direct knowledge of whether any particular employee actually had taken a meal break or whether he had clocked out for some other purpose.

Additionally, allowing detention officers to remain on the clock during their 30-minute meal breaks actually benefitted the Respondent because the employees were available in case of an emergency. Based on uncontradicted testimony, I find that when the detention officers took breaks "on the clock" they carried their two-way radios.[11] In the event of a fight or an escape attempt or some other emergency, the detention officers quickly could be called to the scene of the disturbance.

Credible testimony also establishes that after the detention officers clocked out, they did not carry their radios and therefore were not available to respond to an emergency. The fact that the Respondent would have a reason for allowing the detention officers to remain "on the clock" while they ate makes it more likely that it actually permitted them to do so.

In making this finding, I credit and rely on the testimony of detention officer Marty Jay Palmer, who began work for the Respondent, at its Prairieland facility, in about June 2018. He testified that the Respondent's handbook stated that employees would take *unpaid* 30-minute meal breaks but in actual practice, employees did not clock out:

> Q. Was the handbook consistent with the practice going on at the site?
> A. No, Ma'am. Not in regards to the lunch breaks.
>
> Q. In what ways was it inconsistent?
> A. I believe that the handbook stated that we were required to clock out for lunch breaks. Since I had been there since my hire date and until July of 2020, we never punched out for lunch. We were not required to punch out for lunch. In fact, we were told the exact opposite, not to punch out at lunch specifically and

[11] Detention Officer Keifer Dodge, who began work at the Prairieland facility in about July 2019, testified that after clocking out, he was not required to carry a radio. Former detention officer Scott Longway testified that before July 2020, during a meal break (which was on the clock) he was expected to respond to an emergency. However, when off the clock, he did not have to carry a radio or respond to an emergency, regardless of whether he was on the premises.

Based on my observations of the witnesses, I believe that Dodge and Longway gave reliable testimony and I credit it. Additionally, their testimony is consistent with that of a management witness, Matthew Cook. Recalling his earlier service as a detention officer, Cook testified that when he went on a break he took his radio with him because I wanted to know what was going on in the facility and what I'd be walking back into when I came back in, or if there was a situation that I could help with and I could respond. And then if I were going to leave and leave the facility or be off premises, then I would clock out.

It should be noted that Cook was referring to the 15–minute rest breaks rather than the lunch break. Without dispute, the Respondent paid detention officers for their time on these breaks.

However, the same need to have enough detention officers available to respond to an emergency also provides a reason why officers would carry their radios during a meal break. Based on the credited testimony of Dodge and Longway, I find that, before July 2020, detention officers similarly took their radios during meal breaks.

to remain on the clock to respond to emergencies and stuff.

Detention Officer Karrianna Harder began working at the Prairieland facility in about April 2019, remained employed there at the time of the hearing, and thus had firsthand knowledge of working conditions both before and after the alleged change in July 2020. Based on my observations of the witnesses, I conclude that Harder's testimony, which corroborates Palmer's testimony, is reliable:

> Q. BY MS. HARVEY: Ms. Harder, are you familiar with the handbook policy?
> A. Yes, Ma'am.
>
> Q. How was it different from what was going on prior to July 2020?
> A. Before July 2020, we took our paid 30-minute break, and then sometimes at 2 o'clock if we had the staff, we took restroom breaks and smoke breaks for 15 minutes or so. And then after July 2020, it was mandatory to clock out and only were you allowed to clock out if we had the staff.
>
> Q. So prior to July 2020, the practice was different from the written policies. Is that correct?
> A. Correct.

Former detention officer Scott Longway's testimony corroborates that of Palmer and Harder. Longway, who worked at the Prairieland Detention Center from February 25, 2019 through December 23, 2020, testified that before July 2020, the Respondent always paid him for lunch breaks.

The Respondent maintains that its policy both before and after July 2020 has been the same, and that this policy is stated in its employee handbook. That policy provides that employees receive a 30-minute *unpaid* meal break.

The employee handbook states that only the Respondent's president can change the policies in it. The Respondent elicited testimony that the Respondent's president never changed the policy that the corporation's president never changed the written policy that provided for 30-minute unpaid meal breaks. Based on this testimony, I find that neither the corporation's president nor any other manager changed this language in the handbook or altered it by any other written document provided to employees.

However, I also find that before July 2020, the Respondent did not enforce this policy. The testimony of Harder, Palmer and Longway supports this finding.[12]

The Respondent's witnesses uniformly stated that employees were on the "honor

[12] The testimony of another detention officer, Kyle Riley does not directly contradict that of Harder, Palmer and Longway. When asked about the lunch break policy before July 2020, Riley answered "There really wasn't one that I know of. You just -- you just -- if you could get your lunch, you took it, and if you didn't, you didn't." Counsel did not ask Riley, on either direct or cross-examination, whether the Respondent paid him for this time.

system." In fact, management witnesses used the term "honor system" so consistently it sounded a bit like a talking point, an effort to stay "on message." But characterizing the practice as an "honor system" does not really contradict the testimony of the General Counsel's witnesses that the unpaid lunch policy was not enforced.

One of the Respondent's witnesses, Matthew Cook, had been a lieutenant before taking his present job as a grievance officer.[13] His testimony suggests that, because of the size of the Prairieland facility, it isn't always possible to know when detention officers are taking breaks:

> Q. Okay. Did you ensure that employees clocked out for those breaks?
> A. No. It's really -- there's really no way for me to ensure that they're clocking out unless I were just standing there. But my duties are at the other part of the facility. That's why again we would go -- you know, we worked on the honor system. . .

At another point, Cook testified as follows:

> Q. But you don't really have any knowledge of whether or not employees were clocking out for 30-minute breaks if they remained at the facility, correct?
> A. Right. I did not have access to see who was clocking out and who wasn't.

The testimony of another management witness also supports the conclusion that the break policy set forth in the employee handbook did not match the actual practice. Assistant Warden Leandro Hernandez testified as follows on cross-examination:

> Q. Okay. So, you had said that the breaks are kind of left up to the Officers to take on their own. So, is there a break policy?
> A. There is a break policy, yes, ma'am.
>
> Q. What is it?
> A. Two 15-minute breaks.
>
> Q. And how is that policy enforced?
> A. Again, we are last on that. *We don't enforce the policy*. We leave it on the honor system. It is up to the Officers to take their breaks. [Italics added.]

No employees testified that the Respondent required them to clock out for meal breaks before July 2020. Similarly, no supervisors testified that they required employees to clock out for meals during this time period. If employees had, in fact, been required to clock out for meals, the Respondent presumably would have called supervisors to testify how the Respondent enforced that policy. The Respondent did not.

Likewise, the Respondent did not introduce into evidence any records showing that employees had been disciplined for failing to clock out before taking their lunch breaks. Rather,

[13] A grievance officer investigates and tries to resolve complaints made by detainees.

the Respondent's human resources director, Jody Tillman testified about time and attendance records.

These records showed when employees clocked in and out on particular days, but they did not reveal the reasons for the times spent off the clock. Thus, they fell short of establishing that employees had a practice of clocking out before taking meal breaks.

This shortcoming became particularly apparent when the Respondent used some of the time and attendance records to cross-examine Detention Officer Harder. The records showed that on one occasion, Harder clocked out and then clocked back in mid-shift. The fact that Harder did so might raise a suspicion that Harder used the time off to eat a meal but it does not establish that fact. Harder testified that on this occasion, she had clocked out for a personal matter and not for a meal.

Neither the time and attendance records nor Tillman's testimony about them persuades me that, before July 2020, the Respondent enforced a policy of requiring employees to clock out before their meal breaks. Moreover, Tillman did not work at the Prairieland facility and only visited it about once a year.

In contrast, the employee witnesses drew on their personal experience working at the facility in testifying about actual practices there. Moreover, their testimony paints a consistent picture. Crediting it, I find that before July 2020, the Respondent did not enforce the written unpaid meal break policy in its employee handbook. Rather, it allowed employees to take 30-minute meal breaks without clocking out.

Further, I note that permitting employees to eat while "on the clock" benefitted the Respondent because when an officer ate a meal without clocking out, he took his radio with him. In the event of an emergency, such as a fight or escape attempt, the officer was available to answer a call for assistance.

In sum, the employees' credible and credited testimony establishes that before July 2020, they did not have to clock out while taking meal breaks. Moreover, their testimony receives corroboration from an authoritative source: The Respondent's counsel.

Attorney Bindu R. Gross represented the Respondent in negotiations with the Union, as well as at hearing. On February 24, 2020, the Union's vice president and legal counsel, Kim Q. Nguyen, sent Gross an email concerning the Respondent's break policy. Gross replied:

> Yes, my understanding is that they are paid for their time working/it's a paid lunch.

In a later email to Nguyen on that same date, Gross provided the following explanation:

> The Handbook does identify Security as being entitled to the 30 minute unpaid rest period. But it also states that non-exempt employees (and the DOs are non-exempt) will be paid if they are unable to take their break. *The way this section*

> *of the handbook as been applied, all 12-hour employees (most DOs) have received a paid lunch and are expected to work through it.* That's consistent with this section of the handbook. As I mentioned before, LaSalle PDC tries to accommodate the 15-minute rest periods subject to operating conditions. [Italics added.]

From context, I infer that "DO" stands for "detention officer" and "PDC" refers to the Prairieland Detention Center.

The italicized sentence in the quote above, describing the way the handbook's break policy has been applied, is a bit confusing. It seems contradictory to state that the detention officers on 12-hour shifts "receive a paid lunch" but also that they "are expected to work through it." However, its meaning becomes clearer when read together with a February 20, 2020 email which Gross sent to Nguyen, describing his understanding of how the employee handbook "has been implemented at PDC." Employees working 12–hour shifts, he wrote, "may bring a lunch and eat at their duty station on the clock."

Therefore, I understand Gross' statement that detention officers received a paid lunch but were "expected to work through it" to mean that they were expected to remain at the facility, with their radios, so that they could respond if needed in an emergency.

This interpretation is consistent with the testimony of Dodge, Longway and Cook, described in footnote 11, above, indicating that detention officers kept their radios nearby when they took breaks within the facility but did not take their radios with them if they clocked out and left the facility. This testimony, which I credit, leads me to conclude that in actual practice, before July 2020, officers did not clock out while taking breaks within the facility, and therefore available to respond to an emergency, but did clock out when they left the facility. Thus, they remained on the clock during both meal breaks and rest breaks so long as they stayed within the detention center.

Based on Detention Officer Palmer's testimony I find that this practice existed when he began work at the Prairieland facility in about June 2018. Former Detention Officer Longway's testimony indicates that the same practice was continuing when he began work at that facility in February 2019.

No evidence indicates any departure from this practice before July 2020. Therefore, I conclude that for at least two years before July 2020, the Respondent allowed detention officers to take their 30-minute meal breaks without clocking out, so long as they took those breaks without leaving the facility.

The July 2020 Announcement

Three employee witnesses testified that practice of allowing employees to take their meal breaks "on the clock" changed in July 2020 and that they learned about this change during the "turn-out" meetings or briefings which begin each shift. More specifically, Detention Officer Riley and former Detention Officer Longway testified that Jessie Turner, who is now

chief of security and who previously was a captain, made this announcement during "turn-out" briefings in July 2020. Likewise, Detention Officer Palmer testified as follows:

> Q. Okay. In July 2020, do you recall Captain or Chief Turner attending a briefing?
> A. Yes, Ma'am.
>
> Q. Why was he there?
> A. He was updating us on a policy change for our lunch breaks telling us that we were entitled to two 15-minute breaks as well as a 30-minute lunch break, but we would be required to clock out and take it off the clock.

The Respondent called Chief Turner as a witness but did not address this testimony on direct examination. On cross-examination, Turner testified as follows:

> Q. Did you -- do you recall attending any turnout meetings in July of 2020?
> A. I can say I did, and I can say -- I mean --
>
> Q. It's okay if you don't recall.
> A. Yeah, I don't recall. I mean I can't remember.
>
> Q. Do you recall if you ever discussed the break policy with employees at a turnout meeting?
> A. No, Ma'am.

Being unable to recall falls short of a denial. Based on my observations of the witnesses, I conclude that the testimony of Harder, Longway and Palmer is reliable and credit it. Therefore, I find that Turner did go to the turn-out meetings and did tell employees that they would have to clock out for meal breaks.

The complaint alleges that the Respondent stopped paying employees for lunch breaks in "about July 2020" but does not state when in July the change allegedly occurred. A July 15, 2020 text message allows the date to be pinpointed.

Detention Officer Longway sent the July 15, 2020 text message to Union Vice President Nguyen, to report a change which had been announced the previous day. Longway wrote that management was "[m]aking up new policy you have 2 punch out 4 lunches." Longway further texted "all employees get 30 on the clock Never signed out."

Accordingly, I find that on July 14, 2020, the Respondent announced to employees that they no longer would be paid for their 30-minute meal breaks. Further, I find that not being paid for meal breaks constituted a change from the previous established practice.

Effect of Announcement

The Respondent elicited some testimony from Human Resources Director Tillman concerning her interpretation of the time and attendance records. She saw no change in the

clocking in and out habits of some of the employees. However, she did discern a change in the time records for Detention Officer Longway. She testified:

> Q. Based on your review, did you form an opinion on the time entries Mr. Longway submitted to get paid for time worked at PDC?
> A. Yes, I did.
>
> Q. And based on your review of the time records, did Mr. Longway change his time entry habits before July 2020 and after July 2020?
> A. Yes. . .

Tillman, who was the Respondent's representative and therefore not subject to the sequestration order, heard the testimony of other witnesses. After the testimony quoted above, she started to suggest that Longway said he had been misinformed about the Respondent's break policy. The General Counsel objected that Tillman was mischaracterizing Longway's testimony.

Longway's testimony speaks for itself and requires no interpretation by other witnesses. The relevant point here is that Tillman, after examining Longway's time and attendance records, formed the opinion that his clocking habits changed after the July 2020 announcement.

Tillman's interpretations of the time and attendance records amounts to an expression of opinion, but it is the opinion of a witness experienced in human resources matters and familiar with time and attendance records. It deserves serious consideration, at least for the limited purpose of determining whether the announced change had a significant effect on what bargaining unit employees actually did.

However, such consideration also must take into account that Tillman's analysis of the records necessarily involved a bit of guesswork because those records do not show the reason *why* an employee clocked out. The assumption that an employee clocked out mid-shift to take a meal break may or may not be correct in any particular instance.

To the extent that Tillman's testimony about the time and attendance records has probative value, it suggests that some employees did not change their behavior after being informed that they must clock out for meal breaks but that other employees, such as Longway, did.

Such a conclusion - that only some of the employees complied with the directive to clock out for meals - is plausible because the Respondent did not closely supervise when employees clocked in and out. Rather, it considered them to be on the "honor system." However, it is appropriate to assume that most employees do comply with management's instructions because failing to do so would put them at risk of discipline or even discharge.[14]

[14] At this stage in the proceedings, it is not necessary to determine what make whole remedy is appropriate for any particular employee affected by the change in working conditions.

The record establishes that employees could choose not to take any meal break at all rather than to clock out and not get paid for the half-hour break. Some of them, such as Detention Officer Harder, chose this course rather than receiving, in Harder's words, "money off of my paycheck." They nonetheless suffered an adverse consequence because they had to work longer for the same amount of pay.

Notice To The Union

Until she received Detention Officer Longway's June 15, 2020 text message, discussed above, Union Vice President Nguyen did not know that the Respondent had told employees to clock out before taking a meal break. Even though the Respondent and the Union had begun negotiations for an initial collective-bargaining agreement, no evidence indicates that the Respondent had notified the Union before making this announcement, and I find that it did not. Indeed, the Respondent takes the position that it made no change in working conditions but instead merely reminded employees of the policy set forth in its employee handbook.

On July 15, 2020, after receiving Longway's text message, Union Vice President Nguyen emailed the Respondent's counsel, Bindu Gross. The email stated:

> Hi Bindu - I've received numerous calls this morning from officers indicating that onsite management is making officers clock out for their 30 minute break. Is [sic] never been the practice. Please inquiry with your team to see why this is happening. Additionally, the 30 minutes have always been paid. Is the company no longer paying for the break time?
>
> Your immediate attention to this is appreciated.
>
> Thank you,
> Kim

The same morning, the Union's president, Michael Jones, also sent an email to Gross. It stated:

> Bindu -
>
> There should not be a unilateral change to terms and conditions of something such as paid breaks while we are in the process of bargaining a CBA. The existing policy of these 30 minute breaks being compensable time must be maintained.
>
> Thank you.
>
> Michael Jones
> President
> Federal Contract Guards of America
> [Address omitted]

Gross replied the same day. In an email to both Nguyen and Jones he stated:

> Kim and Mike:
>
> I am looking into this. Can you be more specific about what exactly you claim to be a unilateral change? Is your position that clocking out is a change? Are you alleging that officers are working through their breaks?
>
> Please review our earlier communications on the breaks, discussion on paid/unpaid, and the LaSalle handbook that applies at PDC, copies attached.

Immediately after these paragraphs the following appears in a bolder typeface:

> **Meal and Rest Breaks**
>
> **Administrative employees are required to take a 30 min or 1-hour unpaid lunch break away from their desk or work area each day. Security employees are entitled to a 30-minute unpaid meal break each day. Meal and rest breaks will be scheduled by the department supervisor or manager.**

Union Vice President Nguyen sent Gross a July 25, 2020 letter requesting that the Respondent "cease the practice of requiring detention officers to clock out for their rest period." The letter continued:

> As you know, on July 15, 2020, the Union brought this matter, regarding the mandate to clock out, to your attention. From the company handbook, the practice is that officers shall receive a 30-minutes unpaid lunch break and two 15-minute paid breaks. We have discussed this matter going back to February 2020. Specifically, on February 20, 2020, in an email from you to me - you've indicated that: "Employees working a straight 12 hours (paid) may bring a lunch and eat at their duty station on the clock, if staffing allows they will be given (2), 15 breaks." The Union has brought it to your attention that officers have never and currently do not receive BOTH a 30-minutes meal break and two 15-minutes rest break. There has either been a hybrid of the two ranging from 15 minutes to 45 minutes, and regardless of the duration, officers have never been required to clock out - i.e. all of the time has been paid.
>
> The requirement now to clock out for breaks indicates that officers are not being paid for the breaks. This is a unilateral change to a material work condition that is a mandatory subject of bargaining. The Union is reiterating that your client cease requiring officers to clock out for breaks, and continue to pay for such breaks, as your client has been doing previously.
>
> Failure to do this would require the Union to take additional legal action,

including filing an unfair labor practice charge against the company with the National Labor Relations Board.

Your prompt attention and swift action of this matter are appreciated.

When the Union did not receive an immediate response to the "cease and desist letter," Nguyen sent Gross a follow-up email dated July 29, 2020. It stated:

Hi Bindu - the Union sent you this letter last week. As of today, we have not anything from you, and the unit continues to be required to clock out for lunch.

What is the company's response?

Thanks,

Kim

In an August 11, 2020 email to both Union President Jones and Union Vice President Nguyen, Gross stated that it was "the Company's position that it's complying with status quo by applying the handbook that was in place prior to bargaining. If you have specific instances or scenarios you want to discuss, please let me know."

Based upon the evidence discussed above, I find that the Respondent did not notify the Union before announcing, on July 14, 2020, that employees would have to clock out for their meal breaks. Further, I find that the Respondent has consistently maintained that the term and condition of employment pertaining to meal breaks is set forth in its employee handbook and that it did not change it at any time.

Analysis

As the Board stated in *Defiance Hospital, Inc.*, 330 NLRB 492 (2000), "It is settled law that an employer violates Section 8(a)(5) and (1) if a material change in the conditions of employment is made without consulting with the employees' bargaining representative and providing a meaningful opportunity to bargain." (Internal quotation marks omitted, quoting *Ciba-Geigy Pharmaceuticals Division v. NLRB*, 722 F.2d 1120, 1126 (3d Cir. 1983).

To establish that the Respondent violated Section 8(a)(5) of the Act by making an unlawful unilateral change, the General Counsel must prove (1) the existence of a term or condition of employment which is a mandatory subject of bargaining; (2) that the Respondent made a change in that term or condition of employment; (3) that the change was material, substantial and significant; and (4) that it did so without first notifying the Union and giving it the opportunity to bargain. In the absence of a specific defense, such as waiver, proving all of these elements establishes a violation.

In this case, the term or condition of employment concerns the compensation, if any, which an employee receives for the 30 minutes spent eating a meal during the employee's shift.

For the reasons discussed above, I have concluded that before about July 14, 2020, the Respondent allowed detention officers to take their 30-minute meal breaks without clocking out.

This practice, allowing detention officers to clock out before the meal break, was in existence for at least 2 years before July 2020. The record indicates that during this period, allowing detention officers to eat while on the clock was a consistent and general practice at the Prairieland facility, not merely the isolated result of some supervisor's carelessness or inattention.

Considering both the length of time during which employees did not have to clock out for lunch and the fact that all detention officers consistently enjoyed this benefit - it was not merely a favor bestowed occasionally by some supervisors - I find that the practice had a regular longstanding history such that employees reasonably would expect it to continue.

The existence of a dormant policy statement in the employee handbook does not change this conclusion. What the Respondent actually did during this period established the terms and conditions of employment. When the Respondent's July 14, 2020 changed this practice, it resulted in employees either receiving less pay or else working longer hours.

The Board has held that a change from lax enforcement of a policy to more stringent enforcement is a matter that must be bargained over. *Vanguard Fire & Security Systems*, 345 NLRB 1016, 1017 (2005), citing *Hyatt Regency Memphis*, 296 NLRB 259, 263-264 (1989), enfd. sub nom.in relevant part *Hyatt Corp. v. NLRB*, 939 F.2d 361 (6th Cir. 1991). See also *Beverly Health & Rehabilitation Services*, 346 NLRB 1319, 1327 (2006); *Fresno Bee*, 339 NLRB 1214 (2003)(after employees select an exclusive bargaining representative, their employer then must notify and bargain with the union before implementing its earlier, lawful decision to change a condition of employment).

Both the amount of pay an employee receives and the hours an employee works are quintessential terms and conditions of employment which fall within the duty to bargain. Indeed, Section 8(d) of the Act specifically refers to an employer's obligation "to meet at reasonable times and confer in good faith with respect to *wages, hours*. . ." 29 U.S.C. § 158(d)(italics added). Accordingly, I conclude that the change concerned a mandatory subject of collective bargaining. See *Mackie Automotive Systems*, 336 NLRB 347 (2001)(it is well settled that lunch breaks are a mandatory subject of collective bargaining), citing *Kurdziel Iron of Wauseon*, 327 NLRB 155 (1998), enfd. 208 F.3d 214 (6th Cir. 2000); *Rangaire Acquisition Corp.*, 309 NLRB 1043 (1992), enfd. 9 F.3d 104 (5th Cir. 1993); *Van Dorn Machinery Co.*, 286 NLRB 1233, 1240 (1987), enfd. 881 F.2d 302 (6th Cir. 1989).

Moreover, either a diminution of pay or being forced to work longer hours to receive the same pay constitutes a material, substantial and significant change.

The record also establishes that the Respondent did not notify the Union and give it an opportunity to bargain before implementing this change. The Union only learned about the change after the Respondent's management announced it to the employees. The announcement

itself implemented the change. It was a fait accompli.

It doesn't matter that the Respondent and the Union were then negotiating an initial collective-bargaining agreement because the Respondent had a duty to maintain working conditions as they were, without change, until the Union either agreed to a change or the parties reached impasse on the agreement as a whole. As the Board stated in *Bohemian Club*, 351 NLRB 1065, 1067 (2007):

> Although a union may waive its right to bargain if it receives advance notice of a proposed change and fails to request bargaining, there is no waiver when an employer implements a change without giving the union advance notice and an opportunity to bargain. Such an implementation - as here, a fait accompli - makes any demand for bargaining futile. *Tri-Tech Services*, [340 NLRB 894 (2003)] at 985.

This principle is not some mere technicality, but reflects the realities of the negotiating process. Bargaining has been analogized, albeit inexactly, to a card game and when it begins, the Union's hand is the status quo. To change the status quo unilaterally during the middle of negotiations would be like one player, during the middle of the game, reaching over and removing a card from the other player's hand.

More precisely, if the Respondent wished to begin depriving the employees of the pay they had been receiving for time spent during their meal breaks, it should have proposed this change during bargaining so that the Union could have sought a concession in exchange. To make the change unilaterally not only diminishes the Union's bargaining power but also undercuts the collective-bargaining process itself.

The Board held in *Bottom Line Enterprises*, 302 NLRB 373 (1991), that when parties are engaged in negotiations for a collective-bargaining agreement, an employer's obligation to refrain from unilateral changes extends beyond the mere duty to provide notice and an opportunity to bargain about a particular subject matter; rather it encompasses a duty to refrain from implementation at all, absent overall impasse on bargaining for the agreement as a whole. *RBE Electronics of SD, Inc.*, 320 NLRB 80 (1995).[15]

The Respondent has not raised a defense that it was at an impasse and the record would not support such a claim. Rather, it denies that its July 14, 2020 announcement made any material, substantial and significant change, an argument I find unpersuasive.

To summarize, for the reasons discussed above, I reject the Respondent's argument that its action merely tightened enforcement of an existing policy but made no change in terms and

[15] In *Bottom Line Enterprises*, the Board recognized two limited exceptions to the general rule that during negotiations for a collective–bargaining agreement, and in the absence of an impasse on bargaining for the agreement as a whole, the employer must refrain from implementing a change. These limited exceptions arise either when a union engages in tactics designed to delay bargaining or when economic exigencies compel prompt action. See 320 NLRB at 81. Based on the record as a whole, I find that neither circumstance is present in this case.

conditions of employment. The Respondent created the terms and conditions of employment - the status quo - by what it actually did, not by what it wrote and then ignored.

Further, I find that this change was material, substantial and significant, and concerned a mandatory subject of collective bargaining. Accordingly, and noting that the Respondent has not established the existence of any special circumstances which would allow it to act unilaterally[16], I conclude that the Respondent thereby violated Section 8(a)(5) and (1) of the Act.

Remedy

To remedy the harm caused by the unlawful unilateral change, the Respondent must take certain action specified in the Order below, including posting the notice to employees attached to this decision as Appendix A,[17] and restoring the actual terms and conditions of employment as they existed before July 14, 2020. Additionally, the Respondent shall make unit employees whole for losses resulting from its unlawful unilateral change in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971).[18]

Conclusions of Law

1. The Respondent, LaSalle Southwest Corrections, a corporation with its headquarters in Louisiana and a facility in Alvarado, Texas, is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Charging Party, Federal Contract Guards of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. At all material times, the Charging Party has been the certified exclusive bargaining representative, pursuant to Section 9(a) of the Act, of certain of the Respondent's employees in the following bargaining unit, which is an appropriate unit for collective-bargaining within the meaning of Section 9(b) of the Act: Included: All full-time and regular part-time armed and unarmed detention officers who perform guard duties as defined in Section 9(b)(3) of the Act who are employed by the Employer at the Prairieland Detention Center located at 1209 Sunflower Lane, Alvarado, Texas. Excluded: All other employees, including administrative and clerical employees, professionals, managers and supervisors as defined by the Act.

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[16] The Respondent has not claimed that the Union waived its rights to bargain about the change and such an argument would be rejected because the Respondent announced the change as a fait accompli. The Respondent also has not claimed that it made the change because of exigent circumstances, and the record would not support such a defense.

[17] In addition to physical posting of the notice at the Respondent's facility, notices must also be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. *J. Picini Flooring*, 356 NLRB 11 (2010).

[18] See *NBCUniversal Media, LLC*, 371 NLRB No. 5, fn. 2 (July 15, 2021) ("The *Ogle Protection* formula applies where, as here, the Board is remedying 'a violation of the Act which does not involve cessation of employment status or interim earnings that would in the course of time reduce backpay'").

4. On or about July 14, 2020, the Respondent stopped its established practice of paying employees in the bargaining unit described in paragraph 3, above, for the time they spent during meal breaks.

5. The change described in paragraph 4, above, concerned a mandatory subject of collective-bargaining and was material, substantial and significant.

6. The Respondent made the change described in paragraph 4, above, without first giving the Charging Party notice of the contemplated change and an opportunity to bargain about it and its effects.

7. The Respondent's conduct described in paragraph 6, above, violated Section 8(a)(5) and (1) of the Act.

8. The Respondent did not violate the Act in any other manner alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record in this case, I issue the following recommended[19]

ORDER

The Respondent, LaSalle Southwest Corrections, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Implementing changes in the terms and conditions of employment of bargaining unit employees, including the payment for time employees spend during their meal breaks, without first notifying the Union, Federal Contract Guards of America, and affording it an opportunity to bargain over the proposed changes and their effects.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) At the Union's request, restore the practice of paying employees in the bargaining unit for 30-minute meal breaks, as that policy existed before the unilateral change on or about July 14, 2020.

[19] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, these findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.

(b) Make whole all bargaining unit employees for all losses they suffered because of the unlawful change in its practice of compensating employees for their 30-minute meal breaks. The make-whole relief shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970) enfd. 444 F.2d 502 (6th Cir. 1971) enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

(c) Compensate the employees who receive backpay, as described in subparagraph 2(b), above, for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 16, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year(s).

(d) File with the Regional Director for Region 16 a copy of the corresponding W-2 form for each employee receiving a backpay award.

(e) Preserve and, within 14 days of a request, or such addition time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at its Prairieland Detention Facility in Alvarado, Texas, copies of the attached notice marked "Appendix A."[20] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 days in conspicuous places including all places where notices to employees are customarily posted. In addition to the physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in this proceeding, it shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at the Prairlieland Detention Facility at any time since July 14, 2020.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 3 a sworn certification of a responsible official on a form provided by the

[20] If the Prairieland Detention Facility is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility is closed due to the COVID–19 pandemic, the notices may not be posted until the return to work of a substantial complement of employees, and the notices must be posted within 14 days of such return. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means.

Region attesting to the steps that the Respondent, LaSalle Southwest Corrections, has taken to comply.

Dated Washington, D.C. August 5, 2021

Keltner W. Locke
Administrative Law Judge

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

The National Labor Relations Board has found that we violated federal labor law and has ordered us to post and abide by this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of our bargaining unit employees, notify and, on request, bargain with the Union, Federal Contract Guards of America, as the exclusive collective bargaining representative of our employees in the following bargaining unit:

Included: All full-time and regular part-time armed and unarmed detention officers who perform guard duties as defined in Section 9(b)(3) of the Act who are employed by the Employer at the Prairieland Detention Center located at 1209 Sunflower Lane, Alvarado, Texas.

Excluded: All other employees, including administrative and clerical employees, professionals, managers and supervisors as defined by the Act.

WE WILL, on request of the Union, rescind the change we unlawfully implemented on about July 14, 2020, which ended the practice of compensating employees for their lunch breaks.

WE WILL make bargaining unit employees whole for all losses they suffered because of this unlawful change.

WE WILL compensate unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 16, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year(s) for each employee.

WE WILL file with the Regional Director for Region 16 a copy of each backpay recipient's corresponding W-2 form(s) reflecting the backpay award.

LASALLE SOUTHWEST CORRECTIONS
(Employer)

Dated: _____ **By:** _____
(Representative) **(Title)**

The National Labor Relations Board is an independent Federal Agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to an agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

819 Taylor Street, Room 8A24, Ft. Worth, TX 76102-6178
(817) 978-2921, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/16-CA-264520 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (817) 978-2941.